

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

NOTICE OF MARKET-DOMINANT
PRICE ADJUSTMENT

Docket No. R2013-10R

INITIAL COMMENTS OF THE UNITED STATES POSTAL SERVICE
(August 17, 2015)

I. INTRODUCTION

In remanding this case back to the Commission, the U.S. Court of Appeals for the District of Columbia Circuit ordered that, if the Commission wishes to extend its price cap authority “beyond the regulation of posted rates to regulation of Postal Service operational rules that have ‘rate effects,’”¹ it must come up with a standard that provides coherent guidance to the Postal Service and mailers concerning when changes to mail preparation requirements have price cap implications. It was simply inadequate for the Commission to define its price cap authority as extending to all such changes “that alter a basic characteristic of a mailing.” The Commission’s resulting proposal – a multifactor framework for future case-by-case analysis – compounds, rather than cures, the problems identified by the court. As described below, the framework is vague, unworkable, and non-compliant with the statute or the Commission’s own prior recognition of how the price cap is intended to operate.

In its place, the Commission can and should adopt a bright-line rule that provides the Postal Service, mailers, and other postal stakeholders with clear notice of when a

¹ *U.S. Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d 740, 743 (D.C. Cir. 2015).

proposal will be evaluated under 39 U.S.C. § 3622(d)(1). The most reasonable approach is to apply the price cap only to changes in posted rates, a path that the court left open to the Commission. This is clearly the most effective way to provide the clarity and predictability envisioned in the appellate court's decision. It is also the option that is most consistent with the overall statutory framework created by Congress.

One less attractive alternative would be to adopt a rule under which only changes to posted rates and to the size, weight, or minimum-volume thresholds that define products in the Mail Classification Schedule (MCS) would have price cap impact.² As explained below, this option unnecessarily extends price cap calculation to matters that should be subject to only the qualitative review intended for changes to MCS product descriptions. Nonetheless, this approach would be consistent with both the court's order and the statutory requirements. While either bright-line approach would recognize that the Commission can effectively exercise its statutory authority for evaluating changes to mail classifications and mailing rules, the Postal Service considers the first, rates-only approach to be by far the most workable solution.

II. TO COMPLY WITH THE COURT'S ORDER, THE COMMISSION MUST ARTICULATE A STANDARD THAT BOTH PLACES MEANINGFUL LIMITS ON THE SCOPE OF THE PRICE CAP AND OFFERS CLEAR GUIDANCE TO GOVERN FUTURE CASES

The Postal Service sought judicial review of Order No. 1890, arguing that (1) the phrase "changes in rates" in 39 U.S.C. § 3622(d) is unambiguous, limiting the price cap's application to only actual price changes rather than to changes to mail classifications or mail-preparation requirements; and (2) even if the price cap's

² These thresholds are specified in the MCS sections titled "Size and Weight Limitations" and "Minimum Volume Requirements."

language is ambiguous, the Commission failed to articulate and apply a consistent standard for when the price cap applies.

The court granted the Postal Service's petition in part. It held that the plain language of the term "changes in rates" is not necessarily limited to "changes to the official posted prices of each product,"³ so Section 3622(d) is sufficiently ambiguous that it does not "entirely foreclose the Commission from determining that some mail preparation requirements constitute 'changes in rates.'"⁴ However, the court emphasized that, while the "Commission has some authority" to interpret the price cap broadly enough "to take account of operational rules that have rate effects," that authority is not "unfettered."⁵ As part of its obligation to engage in reasoned decisionmaking, the Commission must "articulate a comprehensible standard for the circumstances in which a change to mail preparation requirements . . . will be considered a 'change in rates,'"⁶ and must apply the standard consistently.⁷

Under the court's analysis, a comprehensible standard must achieve two purposes. First, because the Commission has assured the parties and the court that it would not deem all mail-preparation requirements to be "changes in rates," the standard

³ *U.S. Postal Serv.*, 785 F.3d at 750-51.

⁴ *Id.* at 756; *accord id.* at 753 (statute does not "foreclose the Commission's claim that, in regulating the inflation-based price cap, it has some authority to assess mail preparation requirements that have rate effects").

⁵ *Id.* at 753 (emphasis in original) (noting that the implications of applying the price cap to mail-preparation changes "are potentially staggering").

⁶ *Id.*

⁷ *Id.* at 754 (Commission must adequately explain how the standard applies to the facts of a given case and must apply standard consistently).

must impose limits to “ensure that this promise is kept.”⁸ Second, the standard must offer “meaningful guidance to the Postal Service [and] its customers on how to treat future changes to mail preparation requirements.”⁹ Allowing the Commission to “indiscriminately treat[] mail preparation requirement changes as rate changes” on an ad hoc basis “could have far-reaching and enormous consequences for the day-to-day and month-to-month operations of the Postal Service, including its ability to reasonably manage its own policies.”¹⁰

The court concluded that the Commission’s announced standard, in which a mail-preparation change is subject to the price cap if it changes a “basic characteristic of a mailing,” was “cryptic, to say the least,” “has no content,” and “is indiscriminate.”¹¹ Further, the court held that it was not applied consistently: the Commission conceded that a rule changing the placement of an address label is not a “change in rates” under the purported standard, so it was not clear why a rule changing the type of barcode would be.¹² The court rejected the Commission’s attempt to distinguish “minor” or “trivial” mail-preparation changes from more significant changes for purposes of regulation of the price cap, explaining that it is “unclear why the magnitude of the change determines whether the change affects ‘a basic characteristic of a mailing.’”¹³

⁸ *U.S. Postal Serv.*, 785 F.3d at 754; *accord id.* at 744 (a “boundless” standard is “unreasonable”); *id.* at 753 (noting that a vague standard could “theoretically allow[] the Commission to superintend not only the changes in posted rates listed in the Mail Classification Schedule, but also any of the myriad operational changes that reclassify mailpieces and have ‘rate effects’”).

⁹ *Id.* at 754; *accord id.* at 755 (standard must “resolve[] the ambiguity about the treatment under the price cap of future mail preparation requirement changes” and “provide[] guidance for future cases”).

¹⁰ *Id.* at 755.

¹¹ *Id.* at 754.

¹² *Id.*

¹³ *Id.* at 755.

In short, the court concluded, the Commission's decision "is arbitrary and capricious for lack of reasoned decisionmaking."¹⁴ The court accordingly remanded the case "to the Commission to enunciate an intelligible standard and then reconsider its decision in light of that standard."¹⁵

III. THE PROPOSED FRAMEWORK DOES NOT COMPLY WITH THE COURT ORDER, THE STATUTE, OR THE COMMISSION'S PRIOR RECOGNITION OF HOW THE PRICE CAP SHOULD BE APPLIED

In response to the court's remand, the Commission has presented a multifactor framework "to serve as a guide for a case-by-case analysis to determine whether a mail preparation change is a rate change with price cap implications."¹⁶ However, the court's order and the Commission's enabling statute demand a far clearer standard than a mere litany of open-ended, subjective inquiries to "guide" future "case-by-case analysis."

The Commission's proposed framework includes the following four factors, with 14 additional characteristics specified for the factors:

- (1) Whether the change alters a basic characteristic of the mailing, to wit:
 - (a) Whether the change modifies the size, weight, or content of eligible mail;
 - (b) Whether the change alters the presentation and/or preparation of the mailing in a substantial way;
 - (c) The regularity of the change (periodic vs. one-time);
 - (d) The magnitude of the change; and
 - (e) The complexity of the change relating to mailer behavior;
- (2) The effect of the change on mailers, to wit:
 - (a) Whether the change imposes fixed or variable costs;
 - (b) The effect on high volume and low volume mailers;
 - (c) The number of mailers affected;

¹⁴ *U.S. Postal Serv.*, 785 F.3d at 755.

¹⁵ *Id.* at 756.

¹⁶ Order No. 2586, Order Establishing Procedures on Remand and Requesting Public Comment, PRC Docket No. R2013-10R (July 15, 2015), at 4.

- (d) The volume of mail affected;
 - (e) The benefits to mailers; and
 - (f) The timeframe for mailers to comply with the change;
- (3) The purpose of the change, that is, whether the change:
- (a) Improves the expeditious collection, transportation, and/or delivery of the mail;
 - (b) Aligns with changes in the Postal Service's network and/or equipment; and
 - (c) Is intended to increase a price; and
- (4) Whether the change results in a shift in volume of mail from one category to another, that is, the de facto elimination of a rate category or rate cell.¹⁷

Fundamentally, a comprehensible standard that provides “meaningful guidance to the Postal Service [and] its customers on how to treat future changes to mail preparation requirements” and that “resolves the ambiguity about the treatment under the price cap of future mail preparation requirement changes,” must do more than simply compile a list of open-ended, subjective factors whose practical import will only become known (if at all) after many years of application by the Commission. Ultimately, this standard is no more determinate than the “basic characteristics” standard found unacceptable by the court, and thus provides the Postal Service and other stakeholders with no basis to determine, with any sense of confidence, whether operational changes will implicate the cap as the Postal Service considers such changes and plans its prices.

The Commission's proposed framework unduly constrains the exercise of the Postal Service's authority over operational matters, and acts to inhibit the Postal Service's pursuit of greater efficiency in processing the mail while also greatly expanding the administrative burden of the ratemaking process. Finally, by expressly incorporating open-ended and vague qualitative considerations into the application of the price cap, the framework contradicts the Commission's prior recognition that proper

¹⁷ PRC Order No. 2586 at 3-4.

application of the cap requires the use of clear, readily ascertainable standards, with more qualitative considerations reserved for the Commission's other regulatory channels under the Postal Accountability and Enhancement Act (PAEA).

A. The Commission's Proposed Framework Fails to Provide an Intelligible Standard, as Ordered by the Court

Far from adding "content" and definition to the "basic mail characteristics" standard that the court found to be fatally "cryptic,"¹⁸ the Commission's proposed framework compounds the error by adding even more vague and undefined terms. What alteration to mail preparation counts as "substantial"? Why does the "regularity" of a mail-preparation change affect its character as a "change in rates," and how will greater or lesser "regularity" of a change affect the outcome? What level of "magnitude" and "complexity" would qualify a change as a "rate" change? What qualifies a mailer as "high volume" or "low volume"? How can determinations of "purpose" and "intent" provide meaningful, predictable guidance, in light of the subjective judgments involved? Instead of rising to the court's challenge of defining a "basic mail characteristic," or otherwise producing a bright-line rule separating "rate" changes from other changes, the Commission has merely multiplied the dimensions of problematic ambiguity.

Nor does Order No. 2586 indicate how these factors and characteristics would be used to determine whether the change has price cap implications. What weights apply to the various factors and characteristics, when they might pull in opposite directions with regard to the notion of a price cap impact? The Commission's vague assurance

¹⁸ See *U.S. Postal Serv.*, 783 F.3d at 754.

that “[e]ach of these factors is weighed individually”¹⁹ offers no insight into the key question of how much weight each factor is to receive. Certain sub-factors are redundant and potentially conflicting: a change’s “magnitude” and “complexity” are apparently elements of proposed factor 1, yet a change’s “effect on high volume and low volume mailers,” “the number of mailers affected,” and “the volume of mail affected” simultaneously go to proposed factor 2. Moreover, any resulting shift in volume between mail categories is the subject of proposed factor 4. It is unclear how this redundancy affects the weight that the Commission would give to each factor.

As an example, a change intended to improve the expeditious collection, transportation, and delivery of the mail, and to align with other changes in the Postal Service’s network and/or equipment would be considered under factor 3.²⁰ However, if factor 1 were implicated because the change alters a “basic characteristic of the mailing,” and if factor 2 were implicated because the change would have a significant impact on mailers outside of what they would pay in postage, it would be virtually impossible to predict whether the Commission would deem the change a “rate” change.

In sum, by simply introducing a host of open-ended and undefined factors, the proposed framework is “vague almost to the point of being empty.”²¹ Any meaning that

¹⁹ PRC Order No. 2586 at 4.

²⁰ Compounding the uncertainty inherent in the Commission’s proposed test is the fact that these sub-factors themselves rely on the Commission’s subjective evaluation of the Postal Service’s motives.

²¹ *U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 572 (D.C. Cir. 2004). *U.S. Telecom Ass’n* is the third decision in a series of cases arising from the Federal Communications Commission’s (FCC) efforts to define when a telecommunications carrier’s failure to make its network elements available to a competitor constitutes “impairment” to the competitor’s ability to provide services. *Id.* at 561-63. The FCC’s first two attempts to define impairment were held to be overly broad, undefined, and unreasonable. *Id.* The FCC responded by identifying various factors it would consider in assessing impairment. *Id.* at 563. However, the mere adoption of a multi-factor framework did not by itself cure the standard’s lack of definition. *Id.* at 571-72. Despite the revision, the D.C. Circuit concluded that the standard generated uncertainty and remained “vague almost to the point of being empty.” *Id.*

the standard could provide would only come, if at all, after many years of repeated application by the Commission. Such an approach is clearly inconsistent with the court's mandate, which directs the Commission to "resolve[] the ambiguity about the treatment under the price cap of future mail preparation requirement changes."²²

Finally, the 15-factor framework adds nothing toward fulfilling the promise of the Postal Service and Commission's joint motion to remand Order No. 2322.²³ In that motion, the Postal Service and Commission agreed that the Commission should establish an "intelligible standard," as ordered by the court when it remanded Order No. 1890, and that the Commission should then determine whether the proposed elimination of Return Receipt for Merchandise (RRM) service is a "change in rates" under that new standard.²⁴ Order No. 2322 concerned whether the elimination of an entire service from the MCS should be treated as a rate change. The factors in the Commission's proposed framework do not seem to directly address that situation. For example, factor 4 addresses "de facto" elimination of a rate category or rate cell. The Postal Service's position is that the elimination of an entire service does not delete a rate cell, either actually or de facto. The elimination of the service makes the rate cell obsolete because there no longer is a service to which it applies.²⁵ The Postal Service urges the Commission to acknowledge that the elimination of an entire service does not

²² *U.S. Postal Serv.*, 783 F.3d at 755.

²³ See *U.S. Postal Serv. v. Postal Regulatory Comm'n*, No. 15-1037 (D.C. Cir. June 15, 2015); Joint Motion to Remand Order of the Postal Regulatory Comm'n, *U.S. Postal Serv. v. Postal Regulatory Comm'n*, No. 15-1037 (D.C. Cir. June 5, 2015) [hereinafter "Joint Motion"]; Order No. 2322, Order Conditionally Approving Removal of Return Receipt for Merchandise Service from Mail Classification Schedule, PRC Docket No. MC2015-8 (Jan. 15, 2015).

²⁴ Joint Motion at 4.

²⁵ In a technical sense, the rate cell is removed from the MCS, but only as part of the elimination of the entire service from the MCS.

change any prices, and therefore does not implicate the price cap. Rather, the elimination of the service is to be evaluated and approved or rejected in its own right under the Commission's rules in 39 C.F.R. Part 3020, which incorporates many of the same concerns as those that the Commission has attempted to work into its proposed framework.²⁶ If the Commission disagrees, then it needs to develop a standard that will clearly determine under what circumstances the elimination of a service could have price cap implications.

B. The Proposed Framework Would Impose Unreasonable Effects on the Postal Service's Authority to Manage Operations and Plan Price Changes

The flexibility of the Commission's proposed framework offers no assurance against "indiscriminately treating [some] mail preparation requirement changes as rate changes" and thus fails to avoid "far-reaching and enormous consequences for the day-to-day and month-to-month operations of the Postal Service, including its ability to reasonably manage its own policies."²⁷ With such a general framework, applied on a case-by-case basis, it will be impossible for the Postal Service and mailers to know when operational changes implicate the cap.

One consequence of this is that the Postal Service and mailers would be unable to plan for future price changes. For example, on April 1 the Postal Service hypothetically implements a change to mail preparation rules in the Domestic Mail Manual (DMM), which the Postal Service believes, with 70 percent likelihood, the

²⁶ 39 C.F.R. § 3020.32 (requiring supporting justification for changes to the market-dominant product list, including a showing of "why the change is in accordance with the policies and the applicable criteria of chapter 36 of title 39 of the United States Code" and "why . . . the change . . . advances the objectives of 39 U.S.C. 3622(b), taking into account the factors of 39 U.S.C. 3622(c)"); *id.* § 3020.93(a) (requiring that any proposed changes to product descriptions in the MCS be "not inconsistent with 39 U.S.C. 3642").

²⁷ *U.S. Postal Serv.*, 785 F.3d at 755.

Commission will determine requires noncompliant mailers to pay higher postage, working out to 0.8 percent in cap space.²⁸ Meanwhile, the Postal Service is (also hypothetically) planning to file a price change case on September 15, at which time the CPI cap provides 2 percent in cap space. The Postal Service would then need to decide between (1) raising actual prices by 2 percent, with a 70 percent chance of remand because the Commission determines that 0.8 percent of cap space had already been used; or (2) raising prices by 1.2 percent, and facing a 30 percent risk of forgoing an opportunity to raise prices more in order to cover costs.²⁹

The Commission's framework also imposes significant burdens on the Postal Service's long-standing authority to regulate its own operations, and would put that authority on a collision course with the statutory requirement of "a schedule whereby rates, when necessary and appropriate, would change at regular intervals by predictable amounts."³⁰ Under the Commission's framework, mail preparation changes might or might not be deemed to have a price cap impact, meaning that the Postal Service would be forced to file a precautionary rate case for any DMM change.³¹ This leads to a catch-22: either the Postal Service must wait to package all of its DMM changes with a regular rate case, even though that would interfere with the Postal

²⁸ The 0.8 percent figure would depend on how the Commission would factor in the earlier implementation date for the mail preparation change, compared to the date for the changes in actual rates.

²⁹ The Commission might place the remaining 0.8 percent into the "bank" as unused rate adjustment authority under 39 C.F.R. § 3010.26. But, reflecting Postal Service and mailer concerns, the Postal Service generally would not implement two price changes within a short period of each other. The use of the 0.8 percent in rate authority would likely be delayed considerably, creating a substantial revenue loss to the Postal Service.

³⁰ 39 U.S.C. § 3622(d)(1)(B); *see also* 39 C.F.R. § 3010.8.

³¹ The Commission has no other process in its regulations for determining whether an operational change has price cap implications.

Service's operational needs, or else the Postal Service must file a rate case every time it issues a DMM change throughout the year. If the Postal Service follows the latter route, and the Commission decides that the operational change does in fact constitute a rate change, this would gut the requirement of a regular and predictable rate change schedule, unless the Postal Service took the step of delaying the change until the next price change, contrary to its operational considerations. Either way, the administrative burden of the ratemaking system will increase substantially.

Furthermore, the Postal Service would be put in the position of having to decide whether to proceed with a rule change when its revenue loss, resulting from a possible price cap impact, is not clear at the time of the decision.³² Assume that the hypothetical mail preparation change described above would save the Postal Service \$200 million, with transition costs to the Postal Service of \$50 million, and that the change receives mixed feedback from mailers, with some supporting the efficiency gains for the Postal Service and others objecting to the mailer costs required to meet the new requirement. The Postal Service might conclude that proceeding makes sense only if there is no price cap impact. But the information about whether there would be a price cap impact may not be available until well after the decision whether to proceed with the mail preparation change needs to be made.

³² The Postal Service recognizes that there may be some revenue gain, too, if some customers choose to pay higher prices rather than comply with the mail-preparation rule. But any revenue gain would not be expected to fully offset the revenue loss, because the revenue loss would be calculated based on historical data, before customers have had much opportunity, if any, to adjust to the new requirement, while a revenue gain would result only to the extent that customers actually do not comply, and then mail at the higher prices for non-compliant customers. Moreover, the actual revenue gain would be limited by elasticity effects in which mail exits the Postal Service, along with some mailers continuing to mail, but moving to lower-price options. The price cap impact based on historical data would not reflect any of these factors, and thus would overstate any revenue gained by the Postal Service.

Under the Commission's framework, the Postal Service might not have gone forward with actual mail preparation changes that improved the Postal Service's efficiency, if there would be a revenue loss if the Commission treated the change as a price change subject to the price cap. For example, the deflection standards to qualify as automation-compatible flats were adjusted because flats that are flimsy or "droopy" are more likely to jam or double-feed, and not be readily processed. These standards were adopted despite mailer objections. If the Postal Service had also faced a significant price cap hit, the Postal Service might have changed its decision and forgone the efficiency gains.

Moreover, as is common in DMM rulemakings, the Postal Service adjusted its standards, and the effective dates, in response to mailer feedback. In 2007, the Postal Service relaxed the deflection standard, which could have been determined under the Commission's framework to be a price decrease providing additional price cap space.³³ But this deflection rule caused operational problems, so the Postal Service published a final rule tightening the standard in April, 2009.³⁴ In response to mailer feedback, the Postal Service delayed the effective date, and relaxed the rule in March, 2010. The resulting rule went into effect on June 7, 2010, but deferred the assessment of additional postage for non-compliant flats until October 3, 2010, to provide mailers the opportunity to make changes to slightly stiffen or redesign their non-compliant flats to meet the new standards.³⁵ Those adjustments, reflective of the long-standing back-and-forth between the Postal Service and the mailers regarding operational matters,

³³ 72 Fed. Reg. 15366, 15382 (Mar. 30, 2007).

³⁴ 74 Fed. Reg. 15380, 15381-82 (Apr. 6, 2009).

³⁵ 75 Fed. Reg. 12981 (Mar. 18, 2010).

would have been impractical if the Commission were also involved in determining the price cap impact (both positive and negative) each time the rule was adjusted. Thus, the Commission's framework threatens to ossify the Postal Service's operational standards.

Similarly, the Postal Service changed the specifications for selvage – which is the amount of plastic or polywrap that extends beyond the flat that is wrapped – and the type of polywrap that may be used to conform to mail processing equipment. Too much selvage creates opportunities for pieces to be double-fed on flat sorters or to jam in the induction portion of the equipment.³⁶ This damages the mailpiece and possibly the machine as well. Aligning requirements with optimal automation characteristics helps ensure that automated flats are processed using automation rather than manually. But if the Commission determined that this regulatory change requires a significant price cap hit, then the Postal Service might not have decided to move forward.

Other mail preparation changes make the Postal Service more operationally efficient, but at the same time reduce postage payments to the Postal Service. For example, the Postal Service has changed mail preparation rules to allow mailpieces from multiple mailers to be bundled together, and also to allow bundles from different mailers to be placed on the same pallet. These changes allow mailers to achieve higher levels of presort, resulting in lower prices. At the same time, the larger bundles and pallets which result improve Postal Service efficiency for mail processing. Presumably, if the Commission uses its framework to determine that such changes have price cap implications, these changes would lead to additional cap space for the

³⁶ 74 Fed. Reg. at 15381.

Postal Service. But if the Commission determines price cap implications on a case-by-case basis, then the Postal Service would not know how much price cap space is available when it decides what prices to present to its Governors and the Commission. The CPI price cap information that the Commission provides as a guide on its website would address only part of the information needed to determine how much price cap space is available.³⁷

Uncertainty about possible price cap implications for changes in mailing requirements would also undermine the collaborative relationship between the Postal Service and mailers. Changes in requirements often occur at the request of the mailing community. In reviewing these requested changes, the Postal Service would need to know whether the change is subject to the price cap (and, if it is, the extent of the price cap impact) before deciding whether to move forward. Only the Commission could determine which operational changes are subject to the price cap. The Commission's role would have an unfortunate unintended consequence of dampening the ongoing collaborative efforts with the mailing industry. The Postal Service and mailers would need to wait to learn whether the suggested change would have price cap implications and, if so, how much. However, there is no process by which the Commission would formally rule on that process except through a rate change case; thus, it may become necessary to file a provisional case even during the formative process of developing potential new operational changes. Workgroup discussions would be stalled, limiting mailer participation in discussions about mail preparation proposals. The Postal Service values the relationships built through a 40-year history with the Mailers' Technical

³⁷ See *CPI Figures*, PRC.GOV (July 17, 2015), <http://www.prc.gov/sites/default/files/CPI%20071715.pdf>.

Advisory Committee, the Mail Prep and Entry Steering Committee, and other discussion venues. Ultimately, incorporating price cap review would have a chilling effect on the Postal Service's efforts to work with mailers to improve efficiency.

This concern also extends to the decision whether to eliminate a service. As discussed in section III.A above, the Commission's framework does not provide any guidance as to when a proposal to eliminate a service, such as Return Receipt for Merchandise, will be handled as a change to a product list or product description under 39 C.F.R. Part 3020, Subpart B or Subpart E, respectively, and when it will instead be treated as a price change for the eliminated service under 39 C.F.R. Part 3010. Nor does the framework help to determine when a service can be eliminated without causing a price cap impact, and when a service elimination does have price cap implications.³⁸ The Postal Service's decision whether to eliminate a service, in order to simplify product offerings or for other reasons, might change depending on whether the Postal Service must also use some of its rate adjustment authority to get the elimination approved.

³⁸ In two other instances, the Commission has allowed service eliminations without requiring a price cap impact. Unlike the elimination of RRM service, the eliminations of Return Receipt After Mailing (RRAM) service and Delivery Type service were approved without requiring a price cap impact for current customers of each service. Instead, for RRAM, the volumes were reduced to zero. See Order No. 2388, Order on Price Adjustments for Special Services Products and Related Mail Classification Changes, Docket No. R2015-4 (Mar. 10, 2015), at 9-10; LR-PRC-R2015-4/5, tab "Return Receipt." Mailers had argued that they would need to increase their use of regular Return Receipt service in response to the elimination of RRAM service, thereby increasing their postage payments. Comments of Certified-Mail-Labels.com, PRC Docket No. R2015-4 (Feb. 5, 2015), at 3. For Delivery Type service, the Commission determined that "[a]lthough Delivery Type service will be eliminated, the Notice does not propose price changes to the remaining components of Address Management Services. Moreover, current Delivery Type users have the option of purchasing Address Information Service (AIS) Viewer service at no change in price, or enhanced services at a nominal increase in price." Order No. 490, Order Approving Classification Changes Related to Address Management Services, PRC Docket No. MC2010-25 (July 16, 2010), at 4. Thus, three separate cases involving the elimination of a service with a possible resulting volume shift produced different outcomes. The Postal Service is left in a quandary without a definitive standard, and the Commission's proposed framework sheds no additional light on how such cases could be resolved in a consistent and predictable manner.

The proposed framework is indiscriminate and would sanction the very sort of meddlesome consequences for the Postal Service's day-to-day operations against which the court warned the Commission. A bright-line standard thus is necessary.

C. The Proposed Framework Fails to Satisfy Any of the Statutory Criteria for the Commission's Regulation of Market-Dominant Rates and Classes

Apart from failing to comply with the court's order under the APA, the ad hoc balancing exercise envisioned by the Commission's proposed multifactor test would fail to achieve any of the very objectives that the Commission's system for regulating rates and classes is statutorily required to achieve.³⁹ By shrouding outcomes in mystery until the Commission issues a final order revealing how it has balanced the many factors and considerations, this approach would vitiate, not enhance, predictability and stability in rates (objective 2) and the transparency of the ratemaking process (objective 6). In a premonition of the court's insistence upon "meaningful guidance," the legislative history underlying these statutory commands emphasizes the importance that Congress placed on "extremely clear and well-defined standards . . . established by regulation allowing the Postal Service and the Postal Regulatory Commission to make a rapid determination of whether a rate adjustment meets the applicable criteria."⁴⁰

Perhaps most paradoxical of all is how the Commission's proposed approach would theoretically promote pricing flexibility (objective 4) only by maximizing incentives not to increase efficiency (contrary to objective 1). Most, if not all, mail-preparation criteria changes are aimed at enhancing the efficiency of Postal Service operations: a

³⁹ 39 U.S.C. § 3622(b).

⁴⁰ S. REP. NO. 108-318, at 11 (2004).

goal that the Commission has touted, alongside predictability and stability of rates, as a major rationale of the PAEA itself.⁴¹ If changes that enhance Postal Service efficiency were to detract from the otherwise available price cap authority, then it is difficult to see how the statute could live up to its promise of promoting efficiency gains, and thus keeping mail an attractive medium for communication and commerce. If the available cap is negative, or too small, efficiency-enhancing changes could even be foreclosed for fear that the Commission would deem them to have a price cap impact.

Indeed, the current price cap, predicated as it is on a measure of household inflation rather than a measure that more accurately considers the Postal Service's costs – which are the product of its universal service obligation, its binding interest arbitration process, and its other statutory obligations – already significantly inhibits the Postal Service's ability to be financially stable and threatens its ability to provide adequate and efficient service (objective 5). By presenting the Postal Service with a choice of either increasing rates or enhancing its operational practices, but not doing both, the Commission's approach simply exacerbates the Postal Service's difficulties.

Moreover, as noted above, the Postal Service would have no good options for implementing mail preparation changes, should it face the risk of later cap space determinations by the Commission in its proceedings. The Postal Service could file a pre-emptive price filing for each DMM change, asserting that there is no price cap

⁴¹ See Order No. 1926, Order Granting Exigent Price Increase, PRC Docket No. R2013-11 (Dec. 24, 2013), at 29 ("Important goals of the PAEA are to foster the efficiency of Postal Service's operations and to promote rate predictability and stability."); Postal Regulatory Comm'n, Section 701 Report: Analysis of the Postal Accountability and Enhancement Act of 2006 (Sept. 22, 2011), at 39 ("The Commission finds that, in furtherance of the PAEA's goals, the use of the price cap promotes pricing flexibility for the Postal Service; predictability and stability in prices for mail users; and encourages cost reductions for the Postal Service."); Order No. 547, Order Denying Request for Exigent Rate Adjustments, PRC Docket No. R2010-4 (Sept. 30, 2010), at 80 ("Price cap rate regulation was expected to promote several goals, including, importantly, to incent the Postal Service to reduce costs and improve efficiency.").

impact, but requesting the Commission's concurrence. Alternatively, the Postal Service could implement the DMM changes, and then face the option of withdrawing a change later if the Commission determines in a subsequent rate proceeding that the change results in a substantial price cap impact.⁴² By ensuring a rate case for virtually any change in mail-preparation requirements, the Commission's proposed framework would redouble, not reduce, administrative burden (contrary to objective 6).

Critically, regulating the Postal Service to protect against irrational or unreasonable changes to operational standards does not require the Commission to adopt the blunt approach of applying the price cap to such changes. A broader review of the PAEA reveals a spectrum of different regulatory tools – of which the price cap is merely one – each tailored for different aspects of the fine balance between Postal Service and Commission authority. Congress preserved the Postal Service's decades-long authority to issue operational regulations, such as those in its DMM.⁴³ However, Congress gave the Commission jurisdiction to hear complaints that the Postal Service was exercising that authority improperly.⁴⁴ Moreover, changes in service fundamental enough to affect a mail's "class" were made amenable to regulation under the Commission's classification procedures, established in 39 U.S.C. §§ 3622 and 3642. By contrast, neither the PAEA's text nor its legislative history shows any sign that changes to Postal Service regulations were intended to be regulated through 39 U.S.C.

⁴² The Postal Service believes that these risks would be manageable if review of mail preparation changes were limited to complaint cases. Mailers would file complaints only when mail preparation changes would actually have a substantial adverse impact, and only after conferring with the Postal Service. See 39 C.F.R. § 3030.10(a)(9).

⁴³ 39 U.S.C. § 401(2).

⁴⁴ *Id.* § 3622(a).

§ 3622(d)(1)(A)'s cap on "changes in rates." While that provision could arguably, as the court held, be capable of broad interpretation, it would be more consistent with the overall statutory scheme to allow changes in the Postal Service's operational regulations to be scrutinized through the classification, complaint, or Annual Compliance Determination processes, which allow the Commission to carefully assess the costs and benefits of any change, rather than trying to shoehorn any change into the price cap.

Indeed, the Commission has previously recognized that, under the PAEA's current framework, the price cap is an "objective, quantitative" and "clearly defined" standard, distinct from the PAEA's "qualitative standards" that must be balanced against one another.⁴⁵ Qualitative considerations, the Commission noted, are more suitably applied in Commission proceedings other than a rate case, due to the short time periods involved in rate cases. However, with its proposed standard, the Commission is importing into the price cap analysis a whole host of subjective, qualitative considerations. Therefore, under the standard, the price cap will be anything but "objective" and "clearly defined."

The Commission's framework therefore completely fails to satisfy the court's remand order, which, as discussed in section II above, requires a standard that is limited in scope and provides clear guidance to the Postal Service and mailers as to which mail preparation changes must be treated as rate changes with price cap implications. It also completely fails to meet any of the statutory criteria for the

⁴⁵ Order No. 536, Order Adopting Analytical Principles Regarding Workshare Discount Methodology, PRC Docket No. RM2009-3 (Sept. 14, 2010), at 16-18.

Commission's system for regulating market-dominant rates and classes, and contradicts the Commission's prior recognition as to how the price cap should operate.

IV. THE COMMISSION SHOULD ADOPT A REASONABLE ALTERNATIVE TO THE MULTIFACTOR FRAMEWORK PROPOSED IN ORDER NO. 2586

The Commission's proposed multifactor framework cannot serve as a viable response to either the court's or 39 U.S.C. § 3622(b)'s mandates for transparency and predictability. Instead, the Commission should accept that mail preparation and mail classification changes are best regulated through non-price-cap means, and that the most compliant way to apply the price cap is to limit it to changes in posted rates. Alternatively, if the Commission is determined to treat certain classifications as effective price changes, the only option that provides clear and "meaningful guidance" would be to limit that treatment to changes in true "basic mail characteristics": namely, the size, weight, and minimum-volume eligibility thresholds that define products in the MCS.

A. The Commission Should Construe "Changes in Rates" under 39 U.S.C. § 3622(d)(1)(A) to Mean Only Changes in Posted Rates

On remand, the Commission not only can, but should, construe "changes in rates" to mean only changes in posted rates: that is, changes to the numerical dollar values published in the MCS. Such a construction would deal with any other changes, such as to eligibility conditions, classifications, or the arrangement of rate cells within a product, through regulatory measures other than the price cap. As discussed in section II.A, the D.C. Circuit acknowledged that an interpretation of 39 U.S.C. § 3622(d)(1)(A) under which the rate cap applies only to "changes to the official posted prices of each

product” is a permissible reading of the statute, and the Postal Service believes it is the most reasonable.⁴⁶

Rather than paving a path whereby the Postal Service may “evade the rate cap”⁴⁷ as the Commission has suggested, confining 39 U.S.C. § 3622(d)(1)(A) to posted price changes recognizes that the Commission has other, more suitable statutory tools for reviewing postal initiatives.⁴⁸ After all, the plain language of that provision applies the price cap only to “rates,” but the Commission’s general authority to regulate market-dominant products under 39 U.S.C. § 3622(a)-(c) extends more broadly to “rates and classes.”⁴⁹ For instance, under its regulations implementing 39 U.S.C. §§ 3622 and 3642, the Commission may perform before-the-fact review of changes to the MCS, including changes to the product lists and product descriptions.⁵⁰ If the Commission finds serious problems with a classification change, it has the authority to reject the change outright.⁵¹ With regard to other changes adopted through Postal Service regulations, the Commission also has broad authority over rate and service complaints, which allow the Commission to reverse changes by the Postal Service and impose fines.⁵² Importantly, each source of authority allows the Commission to critically

⁴⁶ *U.S. Postal Serv.*, 785 F.3d at 751 (“Neither interpretation [including the ‘posted-rates-only’ interpretation] conflicts with the statutory definition of ‘rates[.]’”).

⁴⁷ Brief for the Postal Regulatory Comm’n at 43, *U.S. Postal Serv. v. Postal Regulatory Comm’n*, No. 13-1308 (D.C. Cir. May 12, 2015).

⁴⁸ Even with respect to rate changes, the Commission has more tools than just the price cap. Workshare pricing changes are regulated under 39 U.S.C. § 3622(e).

⁴⁹ Although the court determined that this distinction did not mandate one particular interpretation of the statutory language, *U.S. Postal Serv.*, 785 F.3d at 752, the distinction can nonetheless guide whether the Commission’s ultimate choice of interpretation is reasonable.

⁵⁰ 39 C.F.R. Part 3020.

⁵¹ *Id.* § 3020.93.

⁵² 39 U.S.C. § 3662(a), (c)-(d); 39 C.F.R. Part 3030.

evaluate postal initiatives against various statutory policies, including those that safeguard mailers' interests.⁵³ Adopting a narrower interpretation of "changes in rates" in no way deprives the Commission of power to review changes in classifications or mailing rules; it merely steers that review into clear statutory channels instead of letting it mire the waters of price cap regulation.⁵⁴

The Commission would support, rather than undermine, the stated objectives of the PAEA's pricing system by defining the scope of the rate cap in the clearest, most administrable terms. As discussed in section III above, a standard that perpetuates ambiguity about what is and what is not subject to the rate cap fails to satisfy both the court's directive and statutory objectives to promote operational and pricing flexibility, rate predictability, and the Postal Service's ability to pursue initiatives that improve efficiency.⁵⁵ All of those problems would vanish at the steady hand of a standard that cleanly cleaves regulation of prices from regulation of classes. Indeed, by construing the phrase "changes in rates" strictly, the Commission can avoid the "far-reaching and enormous consequences for the day-to-day and month-to-month operations of the Postal Service" that a broader interpretation threatens to generate.⁵⁶

In sum, the Commission should construe the phrase "changes in rates" to mean only changes in actual rates because (1) such approach is consistent with the plain language of the statute; (2) it allows the Commission to employ other, more appropriate sources of authority to regulate changes to mailing rules; and (3) it is the most

⁵³ 39 U.S.C. §§ 3622(b)-(c), 3642, 3662(a).

⁵⁴ See Reply Brief of the U.S. Postal Serv. at 19, *U.S. Postal Serv. v. Postal Regulatory Comm'n*, No. 13-1308 (D.C. Cir. May 12, 2015).

⁵⁵ 39 U.S.C. § 3622(b)(1), (2), (4); see also *id.* at (c)(7).

⁵⁶ *U.S. Postal Serv.*, 785 F.3d at 755.

reasonable way to promote the statutory objectives for the system of regulating market-dominant rates and classes.

B. The Only Alternative Compliant with Judicial and Statutory Requirements Would Be a Bright-Line Rule Applying the Price Cap Strictly to Changes in Posted Rates and in Three Basic Mail Characteristics

If the Commission is disinclined toward the approach outlined in the previous section, then the least problematic alternative would be a bright-line rule that “offers . . . meaningful guidance to the Postal Service [and] its customers on how to treat future changes to mail preparation requirements” and that “resolves the ambiguity of the treatment under the price cap of future mail preparation requirement changes.”⁵⁷ That court-ordered task can be accomplished by substituting for the Commission’s proposed framework a modified version of proposed factor 1(a) that covers only size, weight, and minimum-volume eligibility criteria that define products in the MCS⁵⁸ (and not content-based criteria, as proposed in factor 1(a)). Under this approach, a change can have a price cap effect only if it either changes a posted price or affects the product-defining weight, size, or minimum-volume thresholds in the MCS. If a change does not affect posted prices or one of those three non-price criteria, then the change does not have a price cap effect, although it may be subject to other forms of regulation.

Unlike the rates-only alternative discussed above, this approach imposes mechanical, rate cap calculation upon some operational changes that should be subject to only the qualitative review intended for changes to MCS product descriptions. As

⁵⁷ *U.S. Postal Serv.*, 785 F.3d at 754-55.

⁵⁸ As noted above, these criteria are specified in the MCS sections titled “Size and Weight Limitations” and “Minimum Volume Requirements.”

such, the Postal Service believes this alternative to be inferior to its first proffered option. Nonetheless, this approach would achieve the court's goal of providing clear expectations for the Postal Service and mailers alike, without the need to divine how the Commission might balance numerous ill-defined factors from one case to the next. If the Postal Service seeks to raise a minimum-volume threshold in the MCS from 200 to 300 pieces per mailing, it would be expected to calculate how many mailpieces will be subject to different rates and what the cap impact is. If, on the other hand, the Postal Service changes a requirement about how an address or barcode must be printed, all parties would have a stable expectation that this would not be factored into the price cap, instead of having to guess how the Commission would apply each factor, and which factors it would deem to tip the balance for or against a cap impact.

There is also a logical basis to distinguish product-defining weight, size, and volume criteria from other rate-determining criteria, such as mail preparation or content requirements. The former are the externally-verifiable, objective attributes of a mailing: whether a piece is thin or thick, heavy or light, or tendered *en masse* or piecemeal. These essential attributes are the "basic characteristics of a mailing" to the extent that phrase can be defined. After all, that is why they, and not more granular descriptors, are enumerated as features that define a product in the MCS. Congress itself has singled out size and weight criteria as raising a more fundamental regulatory concern than other characteristics.⁵⁹ As a further illustration of the potential "basic" nature of size and weight, the Commission itself selected those criteria when it needed a single

⁵⁹ 39 U.S.C. § 3682 (requiring the Postal Service to establish size and weight limitations for market-dominant mail "consistent with regulations the Postal Regulatory Commission may prescribe under section 3622"); see also 39 C.F.R. §§ 3010.110-.111. Indeed, size and weight can determine not merely price, but whether an item is mailable at all. 39 U.S.C. § 3001(c)(1)(A).

illustrative example of changes that could affect the price cap.⁶⁰ A bright-line distinction between the largely operational requirements in the DMM and the price-point-defining criteria in the MCS essentially aims at the same concerns reflected in the Commission's proposed factor 3, albeit in a way that provides more meaningful guidance than a series of "factors" to be "weighted individually" on a "case-by-case" basis.⁶¹

Mail preparation and other eligibility requirements certainly do not concern the "basic characteristics of a mailing," whatever that phrase may mean, but rather relate to the activities that a mailer can take to help make the processing of the mailpiece efficient. A barcode on a tub, the grouping of a mailing in bundles or trays,⁶² and the use of electronic documentation may affect postal processing and, arguably, have

⁶⁰ Order No. 2086, Order Adopting Final Rules on the Treatment of Rate Incentives and De Minimis Rate Increases for Price Cap Purposes, PRC Docket No. RM2014-3 (June 3, 2014), at 31 ("The Postal Service could also update size or weight limitations in a manner that resulted in the deletion of a rate cell (for example, by reducing the maximum weight of Bound Printed Matter Parcels from 15 pounds to 10 pounds). See 39 CFR 3020.111.").

⁶¹ Again, to the extent that an operational requirement in the DMM, issued pursuant to the Postal Service's authority under 39 U.S.C. § 401(2), is perceived to be improper in some way, the Commission can address a challenge to the requirement pursuant to its own authority under 39 U.S.C. § 3662.

⁶² A bundle-size rule is materially distinct from product-defining minimum-volume thresholds, in that the former affect not the minimum volume for a given product, but how the pieces within a tendered mailing are grouped together to run on Postal Service processing equipment. Moreover, as the Commission correctly determined, many changes to bundling rules "do not require mailers either to change mailpieces or the basic characteristics of their mailings" and do not affect the price cap. Order No. 1890, Order on Price Adjustments for Market Dominant Products and Related Mail Classification Changes, PRC Docket No. R2013-10 (Nov. 21, 2013), at 72. Similarly, a piece-per-tray minimum reflects operational considerations, including ensuring that mail prepared in standardized trays for automated processing remains oriented in the proper direction during transit, without requiring additional packaging. See 61 Fed. Reg. 10068, 10089 (Mar. 12, 1996); see also Direct Testimony of Anthony M. Pajunas on Behalf of United States Postal Service, Docket No. MC95-1, USPS-T-2, at 25 (Mar. 24, 1995). Indeed, the current 150-piece minimum for First-Class Mail and Standard Mail automation letters is based on the average number of pieces it takes to fill 3/4 of a one-foot tray, 61 Fed. Reg. at 10089, the threshold at which mail can remain faced within the tray, even without banding material, Docket No. MC95-1, USPS-T-2, at 25. . The Postal Service introduced testimony about the piece-per-tray minimum in a proceeding to request a restructuring of mail classifications. Docket No. MC95-1, USPS-T-2, at 25. Notably, the Postal Rate Commission recognized that the primary purpose of such mail preparation requirements was to increase the efficiency of postal operations by optimizing the mail's compatibility with current and future processing methods, but did not suggest, let alone require, that such changes be reflected in the Domestic Mail Classification Schedule. PRC Op., Docket No. MC95-1, at IV-10 through 13; see also *id.* at VI-3 through 16.

implicit effects on what mailers pay, but these incidental features cannot reasonably be said to be “basic characteristics” of what is being mailed, regardless of how that phrase is defined. By the same token, heated seats may affect the experience of driving a vehicle and have implicit effects on what the customer is willing to pay for it, but such a feature is hardly a “basic characteristic” on par with size and weight, which determine whether the vehicle is classified and priced like a sedan, station wagon, or minivan. Size and weight “form[] a base or starting point” and are “fundamental” to one’s mental image of a vehicle or a mailpiece.⁶³ The same simply cannot be said of heated seats, nor of barcoding, bundle groupings, or ancillary mailing documentation.

Rate distinctions based on mailer behavior are aimed at structuring a mailer’s economic choices to provide incentives leading to efficient Postal Service processing, and to allocate the costs of less efficient processing. As such, they form part of a dynamic give-and-take process of resource allocation between the Postal Service and mailers. Reasonable minds could argue about the extent of a mail-preparation- or content-requirement change’s impact on volume or whether efficiency or revenue is the Postal Service’s primary motive behind a particular mail-preparation-requirement change. However, that very amenability to argument means that such changes would need to be assessed on a case-by-case basis, making them a poor fit for a standard that is supposed to bring clarity and predictability. It is in attempting to cover precisely these dynamic, behavior-dependent eligibility criteria that the Commission’s proposed multifactor balancing test founders on the shoals of subjectivity and falls short of the

⁶³ See OXFORD AMERICAN DICTIONARY 68 (1980).

court-enunciated standard of “meaningful guidance to the Postal Service [and] its customers.”⁶⁴

To be sure, certain mail-preparation requirements, such as levels of pre-sortation, are significant enough that they form the basis for rate distinctions in the MCS. As discussed in the previous section, the Commission has ample power to review changes to these requirements through its ability to regulate workshare discounts and mail classifications, and its ability to hear complaints about Postal Service regulations. These clear opportunities for regulatory oversight stand in stark contrast to the haze surrounding any attempt to deal with mail classification changes through the price cap.

In sum, measured against the statutory objectives of 39 U.S.C. § 3622(b), either of the Postal Service’s bright-line approaches would succeed where the Commission’s multifactor balancing test would fail. The rates-only approach provides predictability and clarity regarding what changes are subject to the rate cap; as such, it is the approach most consistent with the court order and the overall statutory framework created by Congress. Nonetheless, the Postal Service’s alternative approach, though less optimal, is also predictable, stable, and transparent: changes in product-defining weight, size, or minimum-volume thresholds would always have cap implications, but changes in mail preparation, content, or other thresholds never would. Ultimately, with clear limits on the types of changes that affect the price cap, there would be little prospect of increased administrative burden from precautionary rate cases or opportunistic complaint cases alleging a failure to account for a change in the price cap.

⁶⁴ *U.S. Postal Serv.*, 785 F.3d at 754.

Perhaps most importantly, either bright-line test would leave the Postal Service free to focus on adjusting mail-preparation requirements for efficiency's sake, instead of holding back or making perverse decisions due to price-cap considerations.

V. CONCLUSION

For the reasons discussed above, the Commission's proposed multifactor framework is vague, wholly unworkable, and non-compliant with the APA, the court's order, and the operative statutory requirements. Instead, the Commission can and should adopt a bright-line rule whereby only changes in posted rates would be evaluated against the price cap. If the Commission remains determined to regulate at least some classification changes through the price cap, however, the only approach that complies with both the court's order and the statutory requirements would be to adopt a bright-line test under which, other than changes in posted rates, only changes in size, weight, or minimum-volume thresholds as defined in the current MCS could have price cap impact. Either approach would recognize that the Commission has other, more suitable regulatory channels for evaluating changes to mail classifications and mailing rules.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Kevin A. Calamoneri
Deputy General Counsel, Headquarters

Richard T. Cooper
Managing Counsel, Corporate & Postal
Business Law

Daniel J. Foucheaux, Jr.
Chief Counsel, Pricing & Product Support

R. Andrew German
Managing Counsel, Legal Strategy

Keith E. Weidner
Chief Counsel, Legal Policy & Legislative
Advice

David C. Belt
Jacob D. Howley
David H. Rubin
Ashley S. Silberhorn

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1135
(202) 268-2986, FAX: -6187
david.h.rubin@usps.gov

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